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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-1500

THE COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF OF CITY OF NEW YORK AMICUS CURIAE

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BRIEF OF CITY OF NEW YORK AMICUS CURIAE

STATEMENT

The City of New York submits this brief for the reasons which immediately follow.

INTEREST OF THE AMICUS CURIAE

The case involves the constitutionality of the federal excise tax on the use of civil aircraft (26 U.S.C. §4491) when levied on a State. It has been held by the court below

to have been properly levied. The tax was applied to the petitioner's use of a helicopter for police purposes. The City of New York uses seven helicopters in its police department and has, in the past, paid an annual tax on them. Claims for refund of such payments have been denied. In addition, the City has been rebuffed in its attempts to recover on constitutional grounds taxes on Transportation by Air paid on governmental air transportation imposed pursuant to Internal Revenue Code §4261, subd. (a). City of New York v. United States, 394 F. Supp. 641 (D.C.S.D. N.Y. 1975), aff'd. 538 F. 2d 308 (2d Cir., 1976), cert. den. ___U.S.____(1976).*

* Since the issues are substantially the same in that case and this, we plan, in the event of reversal here, to seek leave to file a petition for rehearing of our petition for certiorari. In the event of affirmance, of course, there will be no such application.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, reported at 548 F. 2d 33 (1977), in affirming the judgment of the United States District Court for the District of Massachusetts, which had upheld the tax both on the basis of its being a "user's fee" and as a tax undeserving of sovereign immunity, placed its entire reliance on the notion that the tax was a user charge and that consequently it could be levied against the States.

SUMMARY OF ARGUMENT

If the tax on the use of aircraft be viewed as a user charge, its application to a State or its political subdivisions for their use of aircraft (helicopters) in police work is an unconstitutional infringement of the sovereignty of the States and may not be sustained.

There is no reason in the law to justify the characterization of the tax on aircraft

use as a user charge. The fact that the proceeds of this tax are earmarked for the improvement of airways does not result in the tax becoming that which it is not and is not called.

As a tax, the imposition in question is without constitutional warrant because, as applied in this case, it infringes on the sovereignty of the Commonwealth of Massachusetts.

POINT I

IF THE TAX IS ASSUMED TO BE A USER CHARGE, ITS IMPOSITION ON THE COMMONWEALTH OF MASSACHUSETTS FOR ITS USE OF A HELICOPTER FOR PUBLIC SAFETY PURPOSES IS AN IMPERMISSIBLE LEVY AND AN INFRINGEMENT ON THE SOVEREIGNTY OF THE COMMONWEALTH.

The Court below ruled that the tax was a user charge and that hence it was not necessary to reach the constitutional question of sovereign immunity. A similar method of disposing of a related tax on air transportation was used by the Court of Appeals for

the 5th Circuit in Texas v. United States, 72-2 U.S. Tax Cas., ¶16,048 (W.D. Tex., 1972) aff'd 73-1 U.S. Tax Cas., ¶16,085 (5th Cir., 1972). We believe that both these decisions are erroneous. The tax involved is called a tax and there is nothing in the law to indicate that it is a charge for services rendered.

Above and beyond this, we believe that even if it is a charge, such a levy imposes a charge on a State when it is exercising its sovereign powers and that, whether a charge or a tax, it may not infringe on that sovereignty. The characterization of this tax as a user charge in this case, the Texas case and City of New York v. United States, 394 F. Supp. 641, aff'd 538 F 2d 308 (2d Cir., 1976), has far reaching implications because, if the "user charge" imposed against the will of a State can be upheld, a similar charge conceivably may be levied against the Federal

government for services which are now provided without charge.

POINT II

THE TAX WAS CALLED A TAX IN THE LAW WHICH ADDED IT TO THE INTERNAL REVENUE CODE, P.L. 91-258, 26 U.S.C. §4491. IT MAY NOT BE IMPOSED ON THE FUNCTIONS OF A STATE, GOVERNMENTAL IN NATURE, INDEED, UNIQUELY GOVERNMENTAL.

Clearly the Commonwealth of Massachusetts enjoys, in its exercise of governmental functions, the immunity first proclaimed in Collector v. Day, 78 U.S. (11 Wall.) 113 (1870). While Collector v. Day involved the salary of a state judge, the immunity principle of that case continues to apply despite the fact that, in a later era, this Court held that salaries of State employees were subject to federal income tax. Helvering v. Gerhardt, 304 U.S. 405 (1938). Nor was the principle of McCulloch v. Maryland, 17 U.S. (4Wheat.) 316 (1819), affected by this Court's holding that federal

employees' salaries were subject to State income taxes. Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939).

Those cases simply held that the impact on a government resulting from an income tax on the salaries of its employees is too slight to require the application of the immunities accorded to governments. Nor do the cases which whittle down the States' immunity when the Federal tax impinges on non-governmental but proprietary activities [South Carolina v. United States, 199 U.S. 437 (1905); Ohio v. Helvering, 292 U.S. 360 (1934)(taxes on state liquor stores); Allen v. Regents, 304 U.S. 439 (1938) (Admissions tax on state university football games); New York v. United States,326 U.S. 572 (1946) (tax on mineral water)] have any bearing on the case at bar. Here we are dealing not with proprietary activities but with fundamental governmental acts - the maintenance of aircraft for police purposes.

See Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633 (1945): Powell, The Remnant of Intergovernmental Tax Immunities, Id., p.757. These articles bear titles which provide fuel for the opponents of State governmental immunity. The articles themselves paint a picture far less broad and extensive than the titles imply. For the most part, Professor Powell's articles discuss the pre-1945 inroads on the doctrine. Those inroads consist of the taxation of salaries of governmental employees [Helvering v. Gerhardt, 304 U.S. 405 (1938); Graves v. N.Y. ex rel. O'Keefe, 306 U.S. 466 (1939)]; other taxes which had only an indirect bearing on the government involved and which were levied on the taxpayer with the economic, but not the tax, burden falling on the government [Alabama v. King & Boozer, 314 U.S. 1 (1941); James v. Dravo Contracting Co., 302 U.S. 134 (1937); Curry v. United States, 314 U.S. 14

(1941)]; cases involving proprietary activities [Allen v. Regents, 304 U.S. 439(1938); and other analagous holdings.

There is no warrant in the law for considering the tax in question a user charge. The claim that it is such is based on an untenable foundation. In the Texas case, 72-2 U.S. Tax Cas., ¶16,048 (W.D. Tex., 1972) aff'd. 73-1 U.S. Tax Cas., ¶16,085, (5th Cir., 1972), counsel for the State accepted the characterization and agreed in his Statement of Facts, that the "excise tax *** represented a user charge ***."

The question raised is whether the creation by the 1970 legislation of the Airway and Airport Trust Fund (P.L. 91-258, §208, 84 Stat. 250, 49 U.S.C. §1743), which provided that a sum equal to the amount of aircraft use and taxes on Transportation by Air collected should be appropriated for that Fund, converted those taxes into charges.

The Federal government argued successfully in the Texas case that what had been a tax for many years, the tax on Transportation by Air had been transformed into a user charge simply because the 1970 legislation amended I.R.C. §4261 to increase the rate of the tax. That tax had been increased by the Airport and Airway Development and by the Airport and Airway Revenue Acts of 1970. The amendment, however, merely raised the rate of tax and removed from the law the exemption given to state and local governments. I.R.C. §4292.

In the report of the House Committee which recommended the repeal of the provision exempting states and their subdivisions from the air transport tax, we find the genesis of the thought that the tax was a charge. That statement said [U.S.C. Cong. Ad. News, 91st Cong. 2d Sess., Vol 2, 3091 (1970)]: "***this tax [air transport] is

now generally viewed as a user charge." The lack of foundation for this statement is matched only by its inaccuracy. It was inaccurate because it was made before the 1970 legislation was enacted, before the trust fund was set up and before the Internal Revenue Code was amended. Yet it said that the tax, which had always been a tax, was, at the time of the report, viewed as a charge. Such a notion was not supported by the tax law itself prior to the amendment or by the amendatory enactment. In the laws imposing both the air transport and the aircraft use taxes, they are denominated taxes. They are part of the Internal Revenue Code and are subject to all of that Code's applicable provisions, most of which call the imposts taxes. To treat them as charges when the statutes imposing them contain no language indicating that they were intended to be anything other than taxes

would run contrary to the rules of statutory construction.

While it may be proper to advert to Committee reports to resolve an ambiguity, there is no ambiguity in the statute under consideration. The report of the Committee, which calls the Air Transportation tax a user charge, on numerous separate occasions, speaks of it as a tax (U.S.C., Cong. Ad. News, 91st Cong., 2d Sess., Vol. 2, 3076-3125). If the Congress had intended to impose a user charge in lieu of a tax, it could readily have done so by appropriate language in the statute which it was considering and passing, not in the Committee Report.

We feel the issue is plain and that there is no question about the nature of the activities taxed and their constitutional immunity. Counsel for the government have espoused the idea that there no longer remains in the States any vestige of immunity. In its

memorandum in opposition to the City of New York's application to this Court for a writ of certiorari (No. 75-1684) the following astonishing assertion appears at page 4:

> "***petitioner's claim that there is an implied immunity of the states and localities from federal taxation has long been discredited."

There is no authority to support such a statement. One must conclude that the quoted statement borders on the inane in light of the fact that the memorandum in which it was written was submitted after this Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976).

POINT III

THE TAX IN QUESTION DID NOT BECOME A USER CHARGE SIMPLY BECAUSE ITS PROCEEDS HAVE BEEN EARMARKED FOR AIRWAY IMPROVEMENT.

The question which we discuss now is whether the creation by the 1970 legislation of the Airport and Airway Trust Fund and the appropriations of the amounts of

tax collected to finance it, converted that which had been denominated a tax into a charge.

We assert that, even if the tax receipts or their equivalent did go into the Trust Fund, they are nevertheless receipts of taxes and not of charges. The Federal government has, in Texas v. United States, supra, taken the position that the Air Transportation Tax (I.R.C. §4261) was converted into a charge by the 1970 legislation which set up the Trust Fund. Yet the only change in the substance of the tax on Transportation by Air made by the 1970 Act was to raise its rate from 5% to 8% and to remove the exemption given by I.R.C. §4292. We have spoken before about the House Committee's characterization of the tax and observed that, if the Congress had intended to convert what had been a tax into a "user charge", it would have done so

in appropriate language in the statute, not solely in the Committee reports. An unambiguous statute is to be interpreted in accord with the language it employs, and the language employed in passing the instant legislation is that of taxation. It is not different — from the many other sections of the Internal Revenue Code which impose various other taxes.

There are situations in which a true charge is imposed. The City of New York, for example, has since 1962 imposed an annual vault charge (Admin. Code of the City of New York, Chapt. 46, Title Z). The charge is made to owners of property abutting a vault which is used and maintained by them under a City street. There is a direct relationship between the charge and something furnished by the City. The charge is called a charge and not a tax in the law imposing it (id. §Z46-2.0).

In First Nat. City Bank v. City of New York Finance Administration, 44 AD 2d 774, 354 N.Y. Supp. 2d 901 (1st Dept., 1974), mot. for lv. to app. den., 34 NY 2d 519 (1974), the plaintiff, a national bank, claimed immunity from the vault charge under a federal statute which limited taxation of national banks. The courts upheld the charge because it was not a tax.

All taxes are imposed for the purpose of defraying the cost of government, and that cost is always incurred for the benefit of taxpayers and the general public. In a sense, consequently, all taxes can be said to be imposed for services rendered and to be rendered. Under the theory adopted by the Federal government in this case, the remaining vestiges of the sovereign immunity enjoyed by the states and localities

could be destroyed by the simple expedient of earmarking the proceeds of each Federal tax for a particular activity of government. To the extent that a tax defrays more than one kind of governmental expense, it could be, by statute, assigned to defraying the costs of specified categories of expense.

There is no assurance that the trust fund which is enriched by the taxes in question will remain dedicated to the purposes to which it presently is devoted. Diversion has, in fact, happened with the so-called Highway Trust Fund (funded in part by the gasoline tax), and there are movements looking toward a greater diversion of the moneys in that trust fund to mass transit.

That fund was created by §209 of P.L. 84-627, June 29, 1956, c.462, Title II, 70 Stat. 397; 23 U.S.C. §120 f.n. The earliest diversion of funds from that fund for non-

highway purposes came when P.L. 91-605, Title I, §111(a), Dec. 31, 1970, 84 Stat. 1719; 23 U.S.C. §142, directed their use in aid of the construction of preferential bus lanes, loading areas and other facilities, including parking facilities, for mass transportation purposes. The pretext was that these were allied to highway purposes, but the next step was to permit the Secretary of Transportation, beginning in July of 1974, to use some of the Fund for the purchase of buses and, beginning in 1975, to use it for the construction and improvement of rail facilities and the purchase of rolling stock. P.L. 93-87, Title I, §121(a), Aug. 13, 1974, 87 Stat. 259; 23 U.S.C. §142.

From this it is plain that the original dedication of tax receipts to a particular purpose benefiting the taxpayer is readily changeable at the will of the Congress and,

if this may be done, it is hard to see how those taxes can be considered as user charges for the benefit of the taxpayer.

CONCLUSION

The judgment appealed from should be reversed, and the amount of the tax in issue should be refunded.

Respectfully submitted,

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